

---

---

**IN THE  
SUPREME COURT OF MISSOURI**

---

**No. SC85565**

---

**KENNETH S. SMITHER,**

**Respondent,**

**v.**

**DIRECTOR OF REVENUE,  
STATE OF MISSOURI,**

**Appellant.**

---

**Appeal from the Platte County Circuit Court  
The Honorable Daniel M. Czamanske, Judge**

---

**Appellant's Reply Brief**

---

**JEREMIAH W. (JAY) NIXON  
Attorney General**

**CHERYL CAPONEGRO NIELD  
Missouri Bar No. 41569  
Associate Solicitor**

**Post Office Box 899  
Jefferson City, Missouri 65102  
Phone: (573) 751-3321  
Facsimile: (573) 751-8796**

**ATTORNEYS FOR APPELLANT  
DIRECTOR OF REVENUE,  
STATE OF MISSOURI**

---

---



## Table of Contents

Table of Contents.....	1
Table of Authorities .....	2
Argument .....	3
..... Introduction	3
..... Actual restraint	3
..... Submission to custody	3
..... Summary	9
Conclusion.....	11
Certification of Service and of Compliance with Rule 84.06(b) and (c).....	12

## Table of Authorities

### Cases:

<i>Berkemer v. McCarty</i> , 468 U.S. 420, 104 S.Ct. 3138 (1984) .....	9
<i>California v. Hodari D.</i> , 499 U.S. 621, 111 S.Ct. 1547 (1991) .....	5-8
<i>Callendar v. Director of Revenue</i> , 44 S.W.3d 866 (Mo.App., W.D. 2001) .....	7
<i>Hampton v. Big Boy Steel Erection</i> , 121 S.W.3d 220 (Mo. banc 2003) .....	5
<i>Hyde Park Housing Partnership v. Director of Revenue</i> , ..... 850 S.W.2d 82 (Mo. banc 1993)	5
<i>Landman v. Ice Cream Specialties, Inc.</i> , 107 S.W.3d 240 (Mo. banc 2003).....	5
<i>Lincoln County Stone Co., Inc. v. Koenig</i> , 21 S.W.3d 142 (Mo.App., E.D. 2000).....	5
<i>State v. Lorenze</i> , 596 S.W.2d 762 (Mo.App., S.D. 1980) .....	4
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868 (1968).....	9
<i>United States v. Mendenhall</i> , 446 U.S. 544, 100 S.Ct. 1870 (1980) .....	6, 8

### Statutes:

§544.180, RSMo 2000 .....	3-5, 9
---------------------------	--------

### Other:

PERKINS, THE LAW OF ARREST, 25 Iowa L.Rev. 201 (1940).....	6
--	---

## **Argument**

### **Introduction**

Smither and the Director agree that, pursuant to Missouri statute, “[a]n arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise.” Section 544.180, RSMo 2000. But to Smither, “actual restraint” and “submission to custody” amount to the same thing, and require an officer to physically confine or restrain someone; distilled to its essence, Smither’s position is no touching, no arrest. Smither’s view, however, reads words right out of the statute in contravention of established tenets of statutory construction, and ignores precedent as to what constitutes arrest.

### **Actual restraint**

As to the “actual restraint” part of the statutory definition, Smither and the Director agree that the trooper did not lay hands on Smither or otherwise touch him in a restrictive way. Far from abandoning any argument as to actual restraint, however, *see* Resp. Br. at 12, the Director argued in the opening brief, *see* App. Br. at 7-9, that the trooper, by his actions, constructively restrained the otherwise bed-ridden Smither. The Director will not reiterate that argument here.

### **Submission to custody**

As to the “submission to the custody of the officer” part of the statutory arrest definition, Smither argues that submission to custody is distinct from submission to an

officer's assertion of authority (Resp. Br. at 15). Smither then notes that "custody" has been defined as "the actual corporal detention of a prisoner or where one exercises control over the custody of another which confines such other person within certain limits." (Resp. Br. at 15, *quoting* State v. Lorenze, 596 S.W.2d 762, 764 (Mo.App., S.D. 1980)). Given this definition of custody, Smither concludes, Trooper Salfrank could not have arrested Smither because the trooper never restrained or controlled Smither's movements, so Smither could not have submitted to the trooper's custody (Resp. Br. at 15-16). The Director's conclusion to the contrary, Smither asserts, represents an impermissible attempt to ignore the plain language of § *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003) *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82 (Mo. banc 1993) *Lincoln County Stone Co., Inc. v. Koenig*, 21 S.W.3d 142 (Mo.App., E.D. 2000) 544.180. In particular, it requires reading the statute to say simply and exclusively that arrest equals actual restraint. But if the legislature had intended that arrest could only be effectuated by successful exertion of physical control over a subject, then the "submission to the custody of the officer, under authority of a warrant or otherwise" language is read right out of the statute. This Smither may not do.

Even if Smither's view of the arrest statute did not run headlong into these precepts of statutory construction, it is contrary to United States Supreme Court precedent. In *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547 (1991), the United

States Supreme Court considered what constituted a seizure for Fourth Amendment purposes, and, in so doing, discussed what constituted an arrest at common law:

An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.

“Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of the statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or submission.”

*Id.*, PERKINS, THE LAW OF ARREST, 25 Iowa L.Rev. 201 (1940)*Hodari D.* aids the discussion here because the Court treated seizure and arrest alike – “[w]e do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest.” *Hodari D.* reiterates that arrest or seizure must be viewed based on a totality of the circumstances: “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, *in view of all the circumstances surrounding the incident*, a reasonable person would have believed that he was not free to leave.” *Id.*, *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980)*Callendar v. Director*

*of Revenue*, 44 S.W.3d 866 (Mo.App., W.D. 2001)*Hodari D.* teaches that the test for whether a person has been arrested is an objective one. Smither argues that the Director focuses improperly on the words and actions of Trooper Salfrank, where we should instead be focusing on Smither. Resp. Br. 13 (“reading . . . the ‘Implied Consent Advisory’ is focusing exclusively upon the conduct of the trooper.”); Resp. Br. 13-14 (“issuing a summons to Mr. Smither again considers the actions of the trooper, not Mr. Smither”). Resp. Br. 16 (“The Director looks to the actions of the trooper and not the reactions of . . . Mr. Smither”). But, Smither is incorrect, both as to his reading of the Director’s argument and the one he would put in its place:

the test for existence of a “show of authority” is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person.

*United States v. Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877.

It is therefore not appropriate to focus on Smither, as Smither urges. Nor is it appropriate to focus exclusively on the trooper (though the Director has not done so). Rather, the focus should be on what the trooper did and said and whether those words and actions – together – under the circumstances as they existed at the time, would convey to



a reasonable person that he was not free to leave. Under the facts and circumstances of this case, that is the message that Smither should have received.

Smither also hints at dire consequences from what he argues is the Director's "expansive definition of arrest" (Resp. Br. 15). In particular, Smither points out that under the Director's reasoning, an arrest would occur where a trooper activates his lights and a motorist pulls over; the lights constitute a show of authority and pulling over constitutes submission to this show of authority (Resp. Br. 15).

While it is true that an ordinary traffic stop of this sort constitutes a seizure for Fourth Amendment purposes, "the usual traffic stop is more analogous to the so-called 'Terry stop' ...than to a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150 (1984), *citing* *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). Such stops are investigatory in nature, and do not involve, "restraints comparable to those associated with a formal arrest."

Smither's interpretation of Missouri's arrest statute, §

In view of the foregoing, respondent submits that this Court should reverse the judgment of the trial court and remand the case with orders to the trial court to reinstate the Director's revocation of Smither's driving privileges.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

CHERYL CAPONEGRO NIELD  
Missouri Bar No. 41569  
Associate Solicitor

P.O. Box 899  
Jefferson City, Missouri 65102  
(573) 751-3321  
(573) 751-8796 facsimile

Attorneys for Appellant  
Director of Revenue  
State of Missouri

### **Certification of Service and of Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 20<sup>th</sup> day of January, 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Jeffrey S. Eastman  
Attorney at Law  
403 NW Englewood Rd.  
Kansas City, MO 64118

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2,019 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

---

Associate Solicitor